INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Statement of the Case	2
Summary of the Argument	9
Arugment:	
The statute implies that notice shall be given and a hearing held	15
A judicial review is authorized	25
A judicial review has been had	30
Does the statute deny Equal Protection?	35
The statute is a valid exercise of the police power	45

TABLE OF CASES.

	Page
Abie State Bank vs. Weaver, 282 U. S. 766	28
American Manufacturing Co. vs. St. Louis, 250 U. S. 459	28
A. T. & S. F. Ry. Co. vs. Matthews, 174 U. S. 96	43
Arizona Copper Co. vs. Hammer, 250 U. S. 400	21
Bachtel vs. Wilson, 204 U. S. 36	43
Bobbitt vs. State Highway Commission, 138 Kan. 487	26
Bratton vs. Chandler, 260 U. S. 110	22
C. B. & Q. Ry. Co. vs. Chicago, 166 U. S. 226	49
Chicago Ry. Co. vs. Tranbarger, 238 U. S. 78	49
Cities Service Gas Co. vs. Riverside Drainage Dis., 137 Kan. 410	15
City of McPherson vs. Hanson, 87 Kan. 769	18
Danciger vs. Cooley, 248 U. S. 319	28
Detroit Ry. Co. vs. Osborn, 189 U. S. 383	24
Erie Ry. Co. vs. Bd. of Utility Commrs., 254 U. S. 394	46
Fidelity Mutual Life Assn. vs. Mettler, 185 U. S. 308	44
Field vs. Barber Asphalt Co., 194 U. S. 618	44
Finley vs. California, 222 U. S. 28	44
Gilmore Co. Clerk vs. Hentig, 33 Kan. 156	17
Hill vs. Johnson Co., 82 Kan. 813	19
Home Tel. and Teleg. Co. vs. Los Angeles, 211 U. S. 265	22
In Re: Wilshire, 103 Fed. 620, 622	28
Jeffry Mfg. Co. vs. Blagg, 235 U. S. 571	41
La Harpe vs. Gas Co., 69 Kan. 97	2
Lake Shore & Mich. Ry. Co. vs. Clough, 242 U. S. 374	48
Lindsley vs. Natural Carbonic Gas Co., 220 U. S. 61	42
Louisville & Nashville Ry. Co. vs. Melton, 218 U. S. 36	35
Magown vs. Ill. Tr. & Sav. Bank, 170 U. S. 283	44
McCann vs. Telegraph Co., 69 Kan. 210	37
Metropolitan St. Ry. Co. vs. New York, 199 U. S. 1	40
Mfg. Light & Heat Co. vs. Ott, 215 Fed. 910	23
Milwaukee & St. Paul Ry. Co. vs. Minneapolis, 232 U. S. 430	49
Minneapolis vs. St. Paul Ry. Co., 98 Minn. 380, affirmed 214 U. S. 497	49
M. K. & T. vs. Oklahoma, 271 U. S. 303	47
Mo. Pac. Oil Co. vs. Fitzgerald, 160 U. S. 556	16
Mo. Pac. Ry. Co. vs. Omaha, 235 U. S. 127	49
Mt. St. Mary's Cemetery vs. Mullins, 248 U. S. 501	33
Mutual Loan Co. vs. Martell, 222 U. S. 225	44

TABLE OF CASES—(Continued)

	Page
Newman vs. Emporia, 41 Kan. 583	20
New Orleans vs. Drainage Comm., 197 U. S. 453	45
N. Y. & N. E. Ry. Co. vs. Bristol, 151 U. S. 556	49
Paulsen vs. Portland, 149 U. S. 30	22
Pennsylvania Ry. Co. vs. Towners, 245 U. S. 6	28
Plymoth Coal Co. vs. Penn., 232 U. S. 531	21
Provident Savings vs. Malone, 221 U. S. 660	44
Rogers vs. Hennepin Co., 240 U. S. 184	28
Ry. vs. Ry. Commr., 85 Kan. 229	20
Ry. Co. vs. Abilene, 78 Kan. 820	19
Savannah Thunderbolt Ry. Co. vs. Savannah, 198 U. S. 392	40
Schmeling vs. Woolworth, 137 Kan. 573	20
Security Trust Co. vs. Lexington, 203 U. S. 323	30
Silver vs. Silver, 280 U. S. 117	41
So. Ry. Co. vs. Virginia, 290 U. S. 190	15
State ex rel, Logan, vs. State Highway Comm., 133 Kan. 357	25
State ex rel, Wyman, vs. State Highway Comm., 136 Kan. 297	26
State vs. Gas Co., 71 Kan. 508	37
State vs. Weber, 88 Kan. 175	37
St. Louis S. W. Ry. Co. vs. Arkansas, 235 U. S. 350	20
Tatlow vs. Bacon, 101 Kan. 26	19
Tatlow vs Rucker, 251 U. S. 537	19
Tebbetts vs. McElroy, 56 Fed. (2d) 621	28
Toombs vs. Citizens Bank, 281 U. S. 643	21
Tee Gee vs. San Francisco, 235 Fed. 757	28
Wells vs. State, 248 U. S. 165	28
West Chicago Street Ry. Co. vs. Illinois, 201 U. S. 526	49

STATUTES.

Chapter 225, Laws of Kan. 1929, Appendix	52
Sec. 3, Chap. 225, Laws of Kan. 1929	25
Sec. 15, Chap. 225, Laws of Kan. 1929	36
Sec. 16, Chap. 225, Laws of Kan. 1929	3, 10, 36
Sec. 23, Chap. 225, Laws of Kan. 1929	37

The Supreme Court of the United States

OCTOBER TERM, 1934.

No. 412.

PANHANDLE EASTERN PIPE LINE COMPANY,
APPELLANT,

vs.

THE STATE HIGHWAY COMMISSION OF KANSAS,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF KANSAS.

BRIEF OF APPELLEE.

OPINIONS BELOW.

The opinion in the Supreme Court of Kansas in this case is reported in 139 Kan. 185, printed in the record at pages 16 to 30. The opinion on motion for ~~reprint~~ rehearing is reported in 139 Kan. 849 and printed in the records on pages 31 to 32.

JURISDICTION.

Appellee does not wish to contest the jurisdiction of this Court to determine any of the Federal Constitutional questions presented by the record.

STATEMENT OF THE CASE.

In fairness to the Supreme Court of the State of Kansas, appellee, the State Highway Commission feels that a re-statement of this case is advisable in order to avoid any possible confusion as to the facts involved in the record herein and the issues presented, argued, considered and determined in the court below.

Appellee, the State Highway Commission, is an agency of the state, created and existing for the establishment, construction and maintenance of the state highway system. Appellant, the pipeline company, owns, maintains, and operates a pipeline for the transportation of natural gas in interstate commerce. For its own purposes it maintains a private telephone line. Its lines enter the state approximately at the southwest corner and leave the state just south of Kansas City, Kansas. Its lines are located on private easements acquired from the various owners of the lands traversed, except where they cross and intersect the public highways. The State of Kansas makes no charge for the use of its highways for uses of this nature, and it has been held that such transmission lines are a lawful use of the public highways. State v. Weber, 88 Kan. 175, 182; State v. Natural Gas Company, 71 Kan. 508, 510; LaHarpe v. Gas Company, 69 Kan. 97.

Section 16, chapter 225 of the Laws of 1929, provides that whenever any person shall construct or maintain poles, piers, abutments, pipelines, along, upon, or across any state highway, such poles, wires, piers, abutments, pipelines and other fixtures shall be located upon that

part of the right of way of the state highway designated by the State Highway Commission. The Commission is authorized and empowered to require the removal of such poles, piers, and abutments, wires and pipelines and other fixtures now upon state highways from the present location on said state highways to such part of the right of way of said state highways as the State Highway Commission shall designate. The full text of the act is attached as an appendix to this brief.

Section 3 of the same act designates the state highway system and continues:

> "* * * And provided further, That the highways heretofore designated as state highways shall be a part of the state highway system and no substantial change therein shall be made except when the public safety shall require such substantial change."

Appellee instituted this action as an original proceeding in mandamus in the Supreme Court of the State of Kansas, alleging that the Highway Commission was about to and proceeding to reroute certain state highways and to widen certain other state highways and that it was necessary and in the interest of public safety that at certain points within the state where newly acquired state highway right of way intersected or crossed the privately owned pipelines and pole line easements of the appellee, that such lines should be altered and changed by lowering, encasing or removing the same to the outer portion of the newly acquired highway right of way. The Supreme Court of Kansas granted an alternative writ of mandamus directing the appellant to make the changes alleged to be necessary and in the interest of

public safety, or to show cause why the same should not be done. The defendant filed its answer in which it stated:

"6. Answering paragraph 6, defendant admits the location and general nature of the changes in defendant's pipelines and telephone lines, which changes should be made if said new highways are constructed and opened to the public."

"8. Answering paragraph 8 of said motion, defendant admits that the relocation, removal or encasing of defendant's said pipe lines and telephone lines as requested by plaintiff may be done and accomplished without the acquisition of any other or different rights of way by defendant, but alleges that if defendant complies with the orders and demands of plaintiff it will be compelled to incur costs and expenses in the sum of not less than $5,460, the payment of no part of which plaintiff is willing to assume."

"9. Answering paragraph number 9 of said motion, defendant admits that the plaintiff has ordered and directed defendant to make said changes in the location and design of its pipe line and telephone line, and alleges that plaintiff has ordered that said changes be made at defendant's own cost and expense and without cost or expense to plaintiff; admits that plaintiff has furnished defendant with plans and specifications and all information necessary to make, accomplish and perform said changes, and admits that defendant has failed and refused to conform therewith; admits that it has notified plaintiff that it would not make the changes in its said lines as ordered by plaintiff until plaintiff has indicated its willingness and intention to reimburse defendant for the reasonable cost of all required material and labor costs and expenses incurred by the defendant in making the changes in its said lines in

conformity with the plans and specifications of said plaintiff. Defendant states that plaintiff's orders requiring defendant to make such changes at such enormous cost and expense to defendant are unreasonable, arbitrary, and void. Defendant denies that the provisions of sec. 68-415, Revised Statutes of the state of Kansas, 1931 Supplement, have any application to changes, relocations, or removals of pipe lines and telephone lines located upon privately owned rights of way not located along, upon, or across any existing state highway." (R. 9, 10)

"Defendant further alleges that if sec 68-415 R. S. Kansas, 1931 Supp., is given the construction and interpretation placed thereon by plaintiff herein and is construed and interpreted to mean that plaintiff may require the defendant, at defendant's own cost and expense, to remove, relocate, change, and alter the location and design of its pipe lines and telephone lines located upon privately owned property, and at points where the same are not located along, upon or across any existing state highway, said statute is unconstitutional and void under the provisions of the constitution of the United States, and particularly the fifth amendment, and sec. 1 of the fourteenth amendment to the constitution of the United States, in that such construction will operate to take defendant's private property without due process of law and will deny to defendant the equal protection of the laws; that to require defendant to make such changes at its sole cost and expense will operate to unreasonably interfere with defendant's business of transporting natural gas in interstate commerce contrary to the commerce clause of the constitution of the United States, sec. 8, art. 1, of said constitution." (R. 11, 12)

"11. Defendant denies that its rights in its rights of way involved herein are servient and subject to the needs, demands, and requirements of the plain-

tiff to the extent that defendant may be required to expend enormous sums of money in making changes and relocations in its said pipe lines and telephone lines to suit the needs and demands of plaintiff without being duly compensated therefor. Defendant states that its said pipe lines and telephone lines are located upon privately owned rights of way as aforesaid, (fol. 16) and are not located along, upon, or across any existing state highways, and that to require defendant to make such changes and relocations at its own cost and expense will constitute a taking of defendant's private property without due process of law contrary to the provisions of the constitution of the United States as aforesaid; that defendant is ready and willing, and has so notified plaintiff, to make the changes, relocations, and removals as required by the plaintiff, in accordance with its plans and specifications, upon proper commitment for reimbursement by the plaintiff for the reasonable cost and expense which defendant will incur in making such changes and relocations as requested and demanded by plaintiff under its said plans and specifications, but that said plaintiff denies that it is obligated or liable to reimburse defendant for such costs and expenses or any part thereof, and insists that defendant make such changes at its own cost and expense." (R. 12)

The Kansas Supreme Court stated at the beginning of its opinion:

"The parties have collaborated in a most commendable manner in preparation of the motion for the alternative writ and the answer. Issues of fact have been eliminated, and the Highway Commission's motion for judgment on the pleadings raises the legal question on which the parties differ." (R. 17)

The opinion of the Kansas Supreme Court determines and the record involves not more than two questions, viz. First, whether the statute referred to was intended to apply only to highways existing prior to the poles, piers, wires and abutments or whether it was intended to apply equally to highways to be laid out and constructed in the future. Second, as stated by appellant in its answer (R. 11):

> " *** that if sec. 68-415, R. S. Kansas, 1931 Supp., is given the construction and interpretation placed thereon by plaintiff herein and is construed and interpreted to mean that plaintiff may require the defendant, at defendant's own cost and expense, to remove, relocate, change, and alter the location and design of its pipe lines and telephone lines located upon privately owned property, and at points where the same are not located along, upon, or across any existing state highway, said statute is unconstitutional and void under the provisions of the constitution of the United States."

The question of due process, argued, considered, and determined was, therefore, one of substantive law and the Supreme Court of Kansas construed the statute to apply to new highways as well as highways formerly established and held that the requirements of the statute were a valid exercise of the police power. There was never any question raised as to due process in the procedural sense. The motion for the alternative writ of mandamus contained no allegations as to what notice had been given to the pipeline company before the determination by the commission that the changes were necessary and in the interest of public safety. The an-

swer made no attempt to challenge the sufficiency of the notice that was in fact given. This question appears in the record for the first time in appellant's assignment of errors at page 36 of the record whereat it is said:

> "and said commission did, pursuant solely to the supposed authority of said statute, make, said order and requirement without previous notice to the defendant and without hearing afforded to the defendant as required by due process of law, without taking or considering evidence, and based solely upon the arbitrary ex parte decision and opinion of said administrative agency; said statute makes no provision for judicial review on the merits of said order and requirement and makes said order and requirement of said administrative agency final and irrevocable and undertakes to create and impose upon said defendant, upon the sole basis of such arbitrary order and requirement of the said State Highway Commission, an enforcible and final legal duty, to comply with such order and perform the requirements of said State Highway Commission thus depriving defendant of due process of law and taking its property without due process of law;" (R. 36)

This statement is a bold statement of alleged fact made without foundation in the record. As has been stated, the Supreme Court commended the parties on their collaboration in this matter and in the elimination of all questions of fact and appellee submits that it has not been granted the opportunity of alleging and stating the notice, proceedings and hearings which were in fact had before the commission. Appellee here states and frankly confesses that the statement is entirely outside the record—that by reason of the conferences and discussions

held between the parties herein the Highway Commission adopted and directed certain changes in the plans proposed by its engineers resulting in a saving to the pipeline company of the sum of $3205.00. The proceedings of the Commission may have been to some extent of an informal nature but their sufficiency have not been questioned. It is not the intention of the appellee to here contend, and it did not contend below, that notice and an opportunity to be heard were not necessary under the law here involved, and the rules of statutory interpretation which have been adopted by the Supreme Court of Kansas. That Court having held in a long line of cases hereinafter cited that a statute is not unconstitutional for failure to provide notice but that notice must in fact be given and that the statute is unconstitutional only where it prevents the interpolation of notice to the parties involved.

Appellant's claim of lack of an opportunity to be heard in fact results in a denial to the Highway Commission of the right to be heard on the question of the sufficiency of its proceedings. This is the only possible deniel of a hearing now contained in this record.

SUMMARY OF ARGUMENT.

Appellant seeks throughout its brief to create the impression that the order of the Highway Commission was an ex parte affair made without notice and without evidence. This is denied by appellee. The whole contention in this regard is based on an issue of fact and is not contained in the record and was not presented, argued,

or determined, in the court below. It should be entirely disregarded herein. The action was brought for the purpose of obtaining a construction of the statute, Section 16, Chapter 225, Laws of Kansas, 1929, referred to in the pleadings of the parties as set out in the record as R. S. 1931 Supp. 68-415. No attempt was made to question the sufficiency of the proceedings before the commission and the first attempt of this nature is made in this court. The question of whether or not the statute violated the inhibitions of section 1 of the 14th amendment to the Constitution of the United States by reason of the fact that the statute did not in terms provide the method, time or manner of notice to and hearing of the complaints of pipeline and poleline companies which might be affected was not presented below. However, because the principal issue below involved the 14th amendment in the sense of a taking without just compensation and because the question of the sufficiency of the statute may be first considered in this court where the alleged defect is patent we assume that the question may be a proper one for the consideration of this court.

No complaint is made in the record or in the pleadings or briefs below that the order of the Commission violates the constitutional inhibitions of the 14th amendment, except the challenge to the validity of the statute standing alone. Therefore the only issue in this court is the validity of the statute. Appellant makes the point that it is denied the equal protection of the laws by reference to section 15 of the act which separately classifies railroad companies and provides that the Highway

Commission may contribute not to exceed 50% of the cost of structures designed for the elimination of grade crossings. Thus the only two real questions in this case may be stated briefly as follows: (a) Do the provisions of Section 16 deny to appellant due process of law because of their failure to state in terms the method, time, and manner of notice to and of hearing of complaints made by persons affected by the orders of the Commission made under the provisions of this section and, (b) Whether the terms of Section 15, and 16, in separately classifying railroads from pipelines and other transmission lines, violates constitutional inhibitions by denying the equal protection of the laws.

(a) Notice and the opportunity for hearing:

The Supreme Court of Kansas has held in a long line of decisions that statutes of this nature are not necessarily unconstitutional because of their failure to provide notice and an opportunity to be heard. The court holding that such notice is in fact required by the paramount law embodied in the 14th amendment to the constitution of the United States and that such statutes are only unconstitutional where, by their terms, they prohibit the interpolation of such notice; that when the terms of a statute so permit, such a requirement for notice and hearing may be implied. Some states have adopted more technical and narrow rules of statutory construction but this rule has been so firmly established in Kansas that it must be considered as a part of the law here to be considered. This court has in a number

of instances cited hereafter applied the same rule of statutory construction in similar cases, following the elementary proposition that if a statute will bear two constructions one within and the other beyond the constitutional power of the law making body, the courts should adopt that which is consistent with the constitution because it is presumed that the Legislature intended to act within its scope of authority. Because such rule of statutory construction is so firmly established within the jurisdiction of the Kansas Supreme Court, it cannot be denied that notice and an opportunity to be heard under this statute are absolutely required either by the commission or in the process of judicial review. Even if a judicial review were not available to appellant, any failure of the commission to provide such notice and hearing would go to the validity of the commission's order and not to the constitutionality of the statute.

We therefore conclude that the statute is not subject to the criticism suggested.

Appellant assumes in its argument that the statute denies to it the opportunity and the right to judicial review of the action of the Commission. We submit that Section 3 of the Act is a restraint upon the authority of the Commission and creates a jurisdictional fact upon which the validity of the action of the Commission must rest. This section provides that no substantial change shall be made in the state highways unless required by the public safety. The act makes no pretense of authorizing the commission to make a final determination of this fact and the Supreme Court of

Kansas in three different cases hereinafter cited has sustained, twice, in injunction proceedings and once in mandamus, the right of parties litigant to question the necessity in the interest of public safety. It is upon this fact together with the reasonableness of the order of the commission and the plan to be adopted for highway improvements which constitute the only real questions upon which any aggrieved or even affected party could possibly expect to be heard, in any proceeding to be had before the Commission. Whether an order of an administrative body is unreasonable and therefore arbitrary has always been a judicial question. Questions of statutory interpretation and constitutionality of statutes have likewise always been judicial questions. Appellant or any party similarly situated is therefore entitled to be heard upon any of these questions in any court of competent jurisdiction whether it be in a federal or state court. Appellee submits that in fact appellant has had a full and a complete judicial review in this case and before no lesser body than the Supreme Court of the State of Kansas, and that it had therein the right and the opportunity to present any defense it may have seen fit. This action was there begun as an original proceeding and the jurisdictional fact of the necessity in the interest of public safety was alleged and admitted. Appellant could have challenged the form, formality or substance of any part of the proceedings had by the Commission or of the notice given. This it did not do. It says in this court for the first time and on page 4 of its brief that the appellee, " *** through its representa-

tives, verbally ordered the appellant to make the above enumerated changes and alterations forthwith at its own cost and expense. *** " It would seem that this is a late date to first make this sort of a statement, having had the right to a judicial review and having been in fact granted a judicial hearing in the Supreme Court. Appellant is in an odd position in contending here for the first time that it has been denied such an opportunity.

(b) Equal protection:

The court below said in its opinion at page 29 of the record and in disposing of the question of whether or not appellant had been denied the equal protection of the laws by reason of the fact that Section 15 of the act provides that the Commission may contribute not to exceed 50% of the cost of railroad viaducts, underpasses, etc.: "Transmission lines of all kinds are on the same footing and are on the same footing with railroads with respect to grade crossings. Separate classifications of railroad underpasses and viaducts, permitting exercise of the Highway Commission's discretion with reference to apportionment of cost was not unreasonable." We submit that the Supreme Court of Kansas is absolutely correct and that no serious controversy can arise in this case upon this question. We feel that the decisions hereinafter cited fully justify the position taken by the State Supreme Court.

Beginning at page 37 of appellant's brief, it makes a separate point under the sub-head, "The statute as construed cannot be upheld as a valid exercise of the police

power." This question was one of the two contentions of appellant in the court below, however, in this court it lapses into its argument based upon its dehors statement that the order of the Commission was without notice and without hearing. Its principal argument below was built around Cities Service Gas Company v. Riverside Drainage District, 137 Kan. 410, cited at page 38 of its brief. The argument was based upon a confusion of the rights and duties of the parties in a proceeding under the police power and a proceeding under the right of eminent domain. The real question involved in the title is whether by the exercise of its police power a state may take private property in the sense herein involved without full compensation. This question occupies the greater portion of the opinion of the court below and for this reason we hereinafter cite a number of cases which we feel fully justify the position of the lower court.

THE REQUIREMENTS OF NOTICE AND HEARING ARE TO BE IMPLIED FROM THE PROVISIONS OF THE STATUTE.

This record and this appeal are undoubtedly influenced by the recent decision of this court in Southern Railway Company v. Virginia, 290 U. S. 190; 78 L. ed. 260, and this case seems to constitute the backbone of appellant's argument for a reversal. The case here involved is clearly distinguishable from the Virginia case. There the statute provided that the Highway Commissioner could without notice or hearing determine the requirement of public safety for the elimination of a grade crossing. As stated by this court at page 178:

> "He alone would be cognizant of the mental processes which begot his urgent opinion."

An appeal was provided to the State Corporation Commission but the scope of such appeal was the consideration of any possible modification of the plans for the construction of the grade crossing elimination structure. The Corporation Commission had no authority or jurisdiction to inquire as to the existence or non-existence of the fact, "that the public safety or convenience requires that the crossing be made *** above *** the structure of said railroad, etc." Here the statute makes no pretense of authorizing the highway commission to make any final determination of the necessity in the interest of public safety. In the Virginia case the statute was such that notice and an opportunity to be heard could not be implied or interpolated by any reasonable construction.

By the elimination of appellant's statement in the assignment of errors that "said commission did, pursuant solely to the supposed authority of said statute, make said order and requirement without previous notice, etc.," the question of due process in the procedural sense is narrowed to whether the statute is violative of the due process clause of the 14th amendment by virtue of its failure to provide the manner, time, and place of the notice to be served or the opportunity to be heard. This court said in Missouri Pacific Oil Company v. Fitzgerald, 160 U. S. 556, 575, speaking through Mr. Justice Fuller:

> "An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised and passed upon in the court

below, but we may refer to such assignment by way of convenience to ascertain the contentions of plaintiff in error."

The Kansas Supreme Court has firmly adopted a rule of statutory construction which cannot be disregarded in any consideration of the sufficiency of the statute.

The leading case announcing this rule of statutory interpretation is Gilmore County Clerk v. Hentig, 33 Kan. 156, wherein it is said at page 171:

> "In the present case, the statutes do not require that any notice shall be given; hence the defendants in error, plaintiffs below, claim the statute purporting to authorize the construction of sewers and drains is unconstitutional and void, and therefore that no special taxes for the construction of sewers or drains can be levied; while the plaintiffs in error, defendants below, claim that the statute is valid, and that no notice of any kind is necessary. We do not agree with either of the parties. We think that the statute is valid, and still that a notice is required. Of course, if no other or paramount law required that notice should be given, then we would think that the statute would be sufficient within itself, and that no notice of any kind would be required; but we think there is another and paramount law, requiring a notice. This other and paramount law is embodied in the fourteenth amendment to the constitution of the United States, which provides as follows: "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." Such a law is probably also embodied within some of the provisions of our own constitution, though not so clearly as in the said fourteenth amendment.

> As before stated, we think that the statute is valid, but nevertheless that notice of some kind must be given; but as the statute says nothing about a notice, the city evidently has a broad and almost unlimited discretion with reference to the kind of notice that may be given, and the manner in which it may be given."

This principle is applied in City of McPherson v. Hanson, 87 Kan. 769, a criminal prosecution for failure to pay a road tax, quoting from page 773:

> "When the tax became delinquent, and when the prosecution was commenced, a statute was in force giving the same authority to the city conferred by the statutes in effect when the ordinance was adopted. In this situation the ordinance remained in effect. It is true that neither the former law nor the ordinance required in terms a preliminary notice, yet it is probable that a reasonable notice would have been required by interpretation before a prosecution could have been sustained. The reasons for such an interpretation and policy upon which it is based are stated in Gilmore, County Clerk v. Hentig, 33 Kan. 156, 5 Pac. 781, and Railroad Co. v. Abilene, 78 Kan. 820, 98 Pac. 224. This policy was later established in the last enactment and the time to be given in the notice was definitely fixed. When the offense was committed and the case was tried this statute was in effect, and the court gave the appellant the benefit of its provisions by instructing the jury that proof of such notice was necessary.
>
> It will not be claimed that the appellant had a vested right to be prosecuted without a notice for the reason that none was required by the express terms of the statute or the ordinance. The notice, even if not required, was not injurious.

> The rights of the appellant were fully protected. He was subject to the tax and after due notice refused to pay it. This default subjected him to the prosecution."

Railway Company v. Abilene, 78 Kan. 820, is as follows:

> Syl. 5. "It is not necessarily fatal to a special-assessment statute that it does not contain an express provision relating to notice and a hearing. When the terms of the statute permit, such a provision may be implied."

In Tatlow v. Bacon (Rucker), 101 Kan. 26, an execution had been issued against the person of a debtor and the validity of the statute authorizing such procedure was challenged for want of a provision for notice. It is said:

> Syl. 3. "As the statute provides that before issuing an execution the court or judge must be satisfied from evidence produced that the statutory grounds upon which it may issue exist, it is obvious that the legislature contemplated that a hearing should be had and that notice of the hearing should be given to the debtor."

The foregoing case was dismissed for want of jurisdiction by this Court in Tatlow v. Rucker, 251 U. S. 537.

The following language is found in the case of Hill v. Johnson County, 82 Kan. 813, 819:

> "Another objection urged is that the act contains no express provision for notice to the property owners before the special assessment becomes a tax upon the property. A complete answer to this is found in the cases of Gilmore, County Clerk v. Hentig, 33 Kan. 156, and Railroad Co. v. Abilene, 78 Kan. 820. Every

presumption is in favor of the validity of the statute, and it will not be held void merely because there is no express provision for notice to the property owner and opportunity to be heard if there is nothing in the statute which prevents such notice."

Syllabus 3 of Schmeling v. Woolworth Company, 137 Kan. 573, reads as follows:

> "Workmen's Compensation Act—Application of Act—Election—Constitutional Law. The failure of R. S. 1931 Supp. 44-505 and 44-542 to require notice to be given of the election of employers privileged to elect to come within the provisions of the workmen's compensation law, being those in the non-hazardous class, does not render those sections unconstitutional or void as being in violation of the provisions of the fourteenth amendment to the constitution of the United States or in violation of sections 1 and 18 of the bill of rights of the state of Kansas."

Also to quote Syllabus 2 of Railway v. Railway Commissioner, 85 Kan. 229:

> "2—Statute Constitutional—Penalty for Failure to Obey Order of Commissioners. Chapter 271 of the Laws of 1907 is not unconstitutional because it fails to make provision for notice to railroad companies before an order is made requiring them to provide freight depots and freight terminal facilities nor because of the penalty imposed for a failure to obey an order of that kind."

See also Newman v. City of Emporia, 41 Kan. 583.

This same principle has been frequently applied by this Court. To quote from the opinion in St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 369:

"And in doing this we ought not to indulge the presumption either that the Legislature intended to exceed the limits imposed upon state action by the federal constitution, or that the courts of the state will so interpret the legislation as to lead to that result. No canon of construction is better established or more universally observed than this: That if a statute will bear two constructions, one within and the other beyond the constitutional power of the law making body, the courts should adopt that which is consistent with the constitution because it is to be presumed that the Legislature intended to act within the scope of its authority. U. S. v. Coombs, 12 Pet. 72, 76; 9 L. ed. 1004, 1006; Grenada County v. Brogden (Grenada County v. Brown), 112 U. S. 261, 269, 28 L. ed. 704, 707; 5 Sup. Ct. Rep. 125; Japanese Immigrant Case (Yamataya v. Fisher), 189 U. S. 86, 101; 47 L. ed. 721, 726, 23 Sup. Ct. Rep. 611."

In the case of Arizona Copper Company v. Hammer, 250 U. S. 400, the following statement appears at page 430:

"*** and it would be improper for this court to assume in advance that the state court will place such a construction upon the statute as to render it obnoxious to the federal constitution."

See also Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531.

In Toombs v. Citizens Bank, 281 U. S. 643, it is held that a state statute providing that it shall be the duty of the officers and directors of a bank, upon receiving notice from the superintendent of banking that its capital has become impaired, immediately to call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the im-

pairment, may be construed as impliedly requiring reasonable notice of such meeting to be first given.

The court says on page 647 of the opinion:

> "In assailing the constitutionality of a state statute the burden rests upon appellant to establish that it infringes the constitutional guarantee which he invokes. If the state court has not otherwise construed it and it is susceptible of an interpretation which conforms to constitutional requirements, doubts must be resolved in favor of, and not against the state. See Corporation Commission of Oklahoma, etc. v. Lowe, etc., ante, p. 431; South Utah Mines v. Beaver County, 262 U. S. 325, 331."

In the case of Paulsen v. City of Portland, 149 U. S. 30, Syl. 1 reads as follows:

> "In view of the notice actually given of the meetings of the freeholders appointed to estimate the proportionate cost of a sewer in Portland, Oregon, and to assess the proportionate share of the cost thereof upon the several owners of property benefited thereby, and in view of the construction placed upon the ordinance by the City Council, and in view of the approval of the proceedings by the Supreme Court of the State as being in conformity with the laws thereof, Held, that, notwithstanding the doubt arising from the lack of express provision for notice, the requirements of the Constitution as to due process of law had not been violated."

See also Home Telephone & Telegraph Company v. Los Angeles, 211 U. S. 265.

This Court reversed the decision of a Federal District Court enjoining enforcement of a statute of Tennessee in the case of Bratton v. Chandler, 260 U. S. 110, wherein it was held that in view of the rule that a statute must be

construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score, a provision of a statute looking to the licensing of real estate brokers, that the commission is authorized to "require and procure" satisfactory proof as to the qualifications of applicants, will not be held to be unconstitutional, as giving the applicant no opportunity to meet evidence procured by the commission as to his qualifications, through notice and opportunity to be heard.

A very good statement is found in the opinion in Manufacturers Light & Heat Company v. Ott, 215 Fed. 940, 944:

> "4. The statute is not subject to the objection that it attempts to authorize the Commission to take property without due process of law in that it makes no provision for notice and a hearing before fixing rates. The complainants were entitled to notice and a hearing, but express statutory requirement for such notice is not essential, for the reason that the constitutional requirement that there shall be notice and an opportunity to be heard is a part of the law governing the Commission. As the statute is silent on the subject, the presumption is that the Legislature intended the Commission to comply with the Constitution, not to violate it. Such commissions are under two laws, namely, the statute law of the state, which confers upon them certain powers over public service corporations, and the constitutional law of the state and of the United States, which requires that they shall exercise the powers conferred by statute only by due process of law, that is, after giving the companies due notice and opportunity to be heard. A statute is invalid which requires something to be done which is forbidden by the Constitution, but it cannot be essential to the validity of a statute that it should enjoin obedience to the Constitution. Paul-

sen v. Portland, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. ed. 637; Chicago B. & Q. R. R. v. Nebraska, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. ed. 948; French v. Barber A. P. Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. ed. 879."

Very much here in point is the case of Detroit Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, where it was held that neither due process of law nor the equal protection of the laws is denied a street railway company by an order of the commissioner of railroads made and issued under Mich. Puc. Acts 1893, act No. 171, para. 5, requiring such street railway to pay one-half of the expense of constructing and maintaining safety appliances at a grade crossing of a steam railroad which was not built until after the street railway had been constructed.

Syl. 3 is as follows:

"There is a difference between ordinary vehicles and electric cars which the State may, in the exercise of its police power, recognize without denying the company operating the electric cars the equal protection of the laws.

Where the objection that a statute does not provide for notice is taken for the first time in this court, and the record shows that there actually was notice given, it is not open to the plaintiff in error to complain that the statute did not provide for such notice."

DOES THE STATUTE, (CHAPTER 225 LAWS OF 1929) AUTHORIZE JUDICIAL REVIEW OF THE ACTION OF THE COMMISSION?

Under the rules of statutory construction stated above we conclude that the statute does not violate the terms of Section 1 of the 14th Amendment by reason of the fact that it does not in words provide the time or the manner of the service of notice or the time or the mode of the hearing to be granted to the party affected. However, all of the argument of the appellant assumes that the Legislature intended the orders of the Commission to be final determinations. Section 3 of the Act (See Appendix) contains this provision:

> " *** That the highways heretofore designated as state highways shall be a part of the state highway system and no substantial change therein shall be made except when the public safety shall require such substantial change."

The Supreme Court of Kansas has held that this provision in fact authorizes judicial inquiry. The case of State ex rel, Logan, v. State Highway Commission, 133 Kan. 357, was an action to enjoin a proposed highway improvement. The opinion, page 362 quotes the portion of Section 3 as set out above and continues:

> "The language of the provision is plain and needs no interpretation, and the allegations of the petition that the proposed change is substantial and is not being made for public safety would, if taken alone, be sufficient to state a cause of action, although such allegations might well be subject to the criticism of being conclusions rather than statements of fact."

The case of State ex rel, Wyman, v. State Highway Commission, 136 Kan. 297, was likewise an action to enjoin a proposed highway improvement and the case is well summed up in the following paragraph, at pages 297, 298:

> "Appellants state in their brief that they offered evidence to prove the change was a substantial one and the public safety did not require it. It is the refusal to consider this evidence which is urged as error. The evidence is not brought here in the record, neither does the record show that this evidence was ever offered to the trial court in any record form. For that reason, we cannot consider it. (Leach v. Urschel, 112 Kan. 629, 212 Pac. 111.)"

Syllabus No. 2 of Bobbitt v. State Highway Commission, 138 Kan. 487, is as follows:

> "A change in the route of a portion of a transcontinental highway, which eliminates railroad crossings entirely, eliminates corners on intersecting section lines, and reduces curves from six to two, all in thirty miles of highway, is held to be a change in the interest of public safety."

We construe the provision in Section 3, above quoted, to mean that the public safety is a jurisdictional fact upon which the validity of any order of the Highway Commission for a substantial change must rest. Appellant below made no attempt to challenge the validity of the order of the Commission and rested its case entirely upon the validity of the statute, if construed to apply equally to highways in existence and to highways to be established, reestablished, or relocated at a future time. Had an issue been made of the public safety, the lower court would, of necessity, have determined it. It was however entirely

eliminated from consideration by the lower court by appellant's admissions. (See opinion on Motion for a Rehearing, R. 31, 32.)

The changes in the highways which require the structural changes ordered to be made by the peremptory writ of mandamus herein issued are most certainly and undeniably substantial changes. These changes are the entire relocation of highways or the widening of existing highways to such an extent as to require the acquisition of new highway right of way. However, what any court might determine under any existing state of facts to be a substantial change is immaterial here. The exercise of the police power is authorized and can be validly exercised under this statute only in the interest of public safety.

The court below said in its opinion (R. 21, 22):

> "What the highway commission seeks to do is to execute the police power of the state to make public travel on the highways safe. Reasonable regulations to that end may be enforced without compensation to co-users of the highway whose structures make public travel unsafe; and because the public use is paramount and public safety is the desideratum, it makes no difference whether the highway was established before or after the privately owned structures were established."

What are the questions upon which a pipeline company, under similar circumstances, is entitled to a hearing? These are, First, The necessity in the interest of public safety; Second, Whether the plan is reasonable; Third, Whether the Legislature had delegated the state's police

power; and Fourth, Whether such a delegation violates constitutional inhibitions.

The first of these questions is the only one upon which the Commission under any statutory set up conceivable might be legally authorized to make any final determination and as we have seen an action will lie in the state courts to determine this fact.

The second, the reasonableness of the plan, is of course, a proper inquiry for consideration by the Commission but any order or determination of an administrative body must be reasonable and this has always been held to be a judicial question.

In re Wilshire, 103 F. 620, 622.
Tee Gee v. San Francisco, 235 F. 757.
Abie State Bank v. Weaver, 282 U. S. 766.
Tebbetts v. McElroy, 56 F. 2d 621.

It was upon consideration of the first two questions that the Commission adopted changes in the proposed plan which resulted in a saving, according to appellant's estimate, of the sum of $3,205.00 and while dehors the record, we frankly state that had not the Commission done this the Supreme Court of Kansas would undoubtedly have ordered the same changes of plan.

The third question, whether the statute in fact delegated the state's police power, is a question of statutory construction for the state courts and its decision under its own rules of statutory construction is final. American Manufacturing Co. v. St. Louis, 250 U. S. 459; Danciger v. Cooley, 248 U. S. 319; Wells v. State, 248 U. S. 165; Pennsylvania Railroad Co. v. Towers, 245 U. S. 6; Rogers

v. Hennepin Co., 240 U. S. 184. Of course, if the state courts should determine that the legislature had not delegated the state's police power the commission's only remedy would have been to have proceeded by the right of eminent domain and made full compensation for any damages occasioned by the public need.

The last question, whether the law is violative of constitutional inhibitions is a question which could not possibly be finally resolved by any administrative agency or even constitute a proper inquiry.

Had the commission attempted to do the work involved in accomplishing the structural changes in appellant's lines, it most certainly could have been enjoined from any interference with the lines unless it could show necessity in the interest of public safety. Had the company permitted the changes to be made without resorting to a court of equity and had refused to pay the costs involved, the statute requires that the attorney general bring an action to recover the amount of the costs of such changes, and it would have been incumbent upon the Commission to have alleged and proved by competent evidence that the public safety required such substantial changes. In such a case a sufficient defense would be established by showing the changes required are arbitrary and unreasonable under all the circumstances. However, appellee here brought an action in mandamus praying an order of the court directing appellant to make the changes. Appellant had every opportunity to question the sufficiency of the proceedings before the Commission. This it did not do. It stood firmly on the proposition that it was a

denial of due process to require the changes to be made at its own expense. In admitting the public necessity for the changes it admitted every question the Commission had any possible pretense of authority to determine even to its own satisfaction.

The Supreme Court of Kansas in determining every question presented to it has only found that the act applies to new highways as well as preexisting highways and that to require the costs of the changes in the lines necessitated by public safety to be borne by the owner of the lines involved is a valid exercise of the police power. We submit that this Court ought not be called upon to determine further questions of statutory interpretation where they have not been submitted to the Supreme Court of the state wherein the legislation was enacted.

APPELLANT HAS IN FACT BEEN GRANTED A FULL AND COMPLETE JUDICIAL REVIEW.

As we have seen the appellant herein had every opportunity to present any defense that it might have seen fit in the court below. By its admissions it eliminated all questions except that of statutory construction (which question we are not here concerned with) and the question as to whether the statute in fact legally delegated the state's police power to the Highway Commission to accomplish at the cost of the pipeline company the structural changes and alterations of design in appellant's lines. Very much in point with this proposition is the case of Security Trust Company v. Lexington, 203 U. S. 323, Syl. 1:

"Before a special assessment, levied by legislative authority of a State—in this case providing for back taxes in Kentucky—can be actually enforced, or during the process of its enforcement, the taxpayer must have an opportunity to be heard as to its validity and extent; but this rule is met where the state court has afforded the taxpayer full opportunity to be heard on both of those questions, and after such opportunity has rendered a judgment providing for the enforcement of such amount of the tax as it finds actually due."

In that case plaintiff brought an action in the state court for an injunction to restrain the defendants from the collection of certain back taxes accruing in prior years. Temporary injunction was granted and upon the trial the amount of the taxes was reduced and the remainder declared to be a lien upon the property. The judgment was affirmed in the court of appeals of Kentucky and brought to this Court by writ of error. Appellant's principal complaint being that the assessor had levied the tax upon the property without notice in any form and that no provision was made for any hearing by any board of equalization. This Court said, speaking through Mr. Justice Peckham, page 333, 334:

"The statute now before us does not provide for a notice of the special assessment, nor did the plaintiff have an opportunity to be heard as to the assessment before the board of equalization.

"But in this case the state court has afforded to the taxpayer full opportunity to be heard on the question of the validity and amount of the tax, and after such opportunity has rendered a judgment which provides for the enforcement of the tax as it

has been reduced by the court, the reduction amounting to over five thousand dollars. The plaintiff has, therefore, been heard, and on the hearing has succeeded in reducing the assessment. What more ought to be given? Whether the opportunity to be heard which has been afforded to the plaintiff has been pursuant to the provisions of some statute, as in McMillen v. Anderson, 95 U. S. 37, and Hagar v. Reclamation District, 111 U. S. 701, or by the holding of the court that the plaintiff has such right in the trial of a suit to enjoin the collection of the tax, is not material. The state court in this case has held the taxpayer entitled to a hearing and has granted and enforced such right, and upon the trial has reduced the tax. In so doing the court below has not assumed the legislative function of making an assessment. It has merely reduced, after a full hearing, the amount of an assessment made by the assessor under color at least of legislative authority."

Quoting from page 335:

"We think it sufficiently appears that the plaintiff had an opportunity to be heard upon the question of the validity of the tax, both for want of notice in fact, and whether the property assessed for back taxes had really been omitted from the original list for the years in question, and was therefore properly taxable under the assessment for back taxes. Even if the assessment had been made by the assessor without notice, yet if upon the hearing in this cause the plaintiff had the right and an opportunity to be heard, and the assessment was thereon reduced, it has obtained all the hearing it was entitled to. We think the plaintiff did have such a hearing, and the judgment is correct, so far at least as this court is authorized to review it. It is therefore Affirmed."

In the case of Mt. St. Mary's Cemetery v. Mullins, 248 U. S. 501, a similar conclusion was reached. The fourth syllabus reads as follows:

> "Notice and opportunity to be heard before the creation of a special improvement district are not essential to due process if a full hearing be afforded in subsequent judicial proceedings to enforce the tax."

Quoting from the opinion of the court, pages 505, 506:

> "It is insisted that no notice was given, or opportunity to be heard, prior to the creation of the sewer district, and, therefore, due process of law was denied. These tax bills were levied upon districts the creation of which was authorized by legislative authority. The record discloses that the owner has had full opportunity to be heard, in judicial proceedings to enforce the tax, and its contentions of arbitrary action and lack of benefits conferred have been considered and decided. This is due process. Davidson v. New Orleans, 96 U. S. 97; Embree v. Kansas City Road District, 240 U. S. 242, 251."

In the case at bar the appellant cannot deny that it had every opportunity in the Supreme Court of the State of Kansas to offer any defense that it saw fit. It in no way assailed the validity of the order of the Highway Commission but stood solely upon the construction of the statute and the validity of the statute when measured by the first clause of the 14th amendment to the Constitution of the United States in its substantive sense as distinguished from its procedural or remedial sense as well as by the equal protection clause and the interstate commerce clause of the constitution.

The statute provides that the commission may do the work involved, after demand and refusal, and that the attorney general shall bring suit in the name of the state to recover the amount of such costs. It is not to be presumed that the legislature intended the commission to undertake to lower, move or encase the 24 inch high pressure interstate natural gas pipe line of appellant or to undertake to move high voltage electrical transmission lines or even any part of the great telephone or telegraph systems. Were a single pipe, pole, pier or abutment involved, the commission might safely and efficiently perform the work and have a suit instituted to recover the cost. Appellant admits, R. 12:

> " *** that plaintiff is not in position to make the changes or to attempt to make such changes in defendant's pipe lines and telephone lines, and that it would be impractical to attempt to make such changes, and admits that such work can be accomplished efficiently and with reasonable safety only by persons acting under the control of the defendant."

Because appellee can exercise no control over the officers and employees of appellant, it must find its remedy before the courts and proceed in mandamus or pursue another similar remedy. This has been done in this case and regardless of the procedure before the highway commission, we submit that appellant has had a full and complete judicial hearing.

APPELLANT IS NOT DENIED THE EQUAL PROTECTION OF THE LAW.

Appellant urgently contends that Sec. 16, chap. 225, Laws of Kansas, 1929, denies to the appellant the equal protection of the laws in violation of the 14th amendment to the Federal Constitution (appellant's brief 33-37).

This clause is an inhibition upon the power of the state and prohibits the legislature of any state from enacting legislation which discriminates between individuals of the same class. A state through its legislature can, however, classify the subjects of its legislation and such classifications, if not unreasonable and discriminatory, will be upheld. The presumption is that the legislative classification is reasonable. In the case of Louisville & Nashville Co. v. Melton, 218 U. S. 36, this Court said at page 52 of the opinion:

> "That the Fourteenth Amendment was not intended to and does not strip the States of the power to exert their lawful police authority is settled, and requires no reference to authorities. And it is equally settled—as we shall hereafter take occasion to show—as the essential result of the elementary doctrine that the equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority, therefore that clause is not offended against simply because as the result of the exercise of the power to classify some inequality may be occasioned. That is to say, as the power to classify is not taken away by the operation of the equal protection of the law clause, a wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition."

The question as to whether a legislative enactment is such that it denies to certain individuals the equal protection of the law usually depends upon whether those subjected to the various laws are of the same or different classes. There is no discrimination merely because the burdens of the legislation rest unequally, provided, that the subjects of those burdens are not in the same class as those not subjected to a similar burden.

Such is the issue here. Appellant contends that it and other companies maintaining pipe lines, telephone and telegraph lines, etc., are subjected to a greater burden than are railroad companies. Sec. 16 of the act under consideration (Chap. 225, Laws of Kansas, 1929) provides as follows:

> "That the state highway commission, in the construction, improvement, reconstruction or maintenance of the state highway system, shall have the power and authority to compel all railroad companies operating steam or electric railroads in this state to construct, improve, reconstruct or maintain in a manner to be approved by the state highway commission, viaducts, tunnels, underpasses, bridges or grade crossings. *** Provided, That the expense of such construction, improvement, reconstruction or maintenance may be divided between the railroad company and the state highway commission in a fair and equitable proportion to be determined by the state highway commission, the state highway commission, however, to pay not to exceed fifty per cent (50%) of the cost of such construction, improvement, reconstruction or maintenance *** ."

It will be observed that Sec. 15 applies only to railroad companies and provides that this appellee shall determine

the proportion of the cost of said construction work to be paid by it, but such payment shall not exceed 50%. Section 16 applies only to companies created for the purpose of constructing and maintaining pipe lines, telephone and telegraph lines, etc., and provides that all of the cost of moving, changing or relocating such lines shall be paid by the owners thereof.

It seems obvious that each section applies to a distinct and different class of individuals. There is no similarity between the classes subjected to the burdens of Sec. 15 and the classes subjected to the burdens of Sec. 16, except that both are engaged in transportation for profit.

Railroads are common carriers and are in direct competition with the users of the highways while no form of transportation yet devised offers serious competition to pipelines, power lines, telegraph or telephone lines. Pipeline companies and other transmission line companies use the highways for their own purposes while the railroads furnish their own highways. A portion of nearly every mile [redacted] of public highway in this country is occupied by one or more lines of various transmission companies. The uses of the various users of the highways are inconsistent only when they interfere with each other. Appellant's right to use the highways has never been denied, provided it is done in a way that will not seriously impede or endanger public travel or unnecessarily interfere with the reasonable use of the highway by other members of the public. State v. Weber, 88 Kan. 175; State v. Gas Company, 71 Kan. 508; McCann v. Telegraph Company, 69 Kan. 210.

Railroads in the very nature of things must have the exclusive and uninterrupted use of their rights of way. The pipeline company owns certain easements. These are merely rights to cross the land with its pipes and poles. The Highway Commission has likewise acquired by purchase from the owners of the same land easements for highway purposes. The rights of the parties are not inconsistent except that in certain particular instances the public safety requires certain structural alterations in the pipelines and polelines. Every time a railroad builds a viaduct or other grade crossing elimination structure it is in fact aiding its competitors by making travel on the highways more convenient and less hazardous.

Section 23 of the Act here under consideration provides that any person who shall without contributing negligence on his part sustain damage by reason of a defect in a state highway may recover such damages from the State of Kansas. This liability is not predicated on negligence but is predicated upon the existence of a defect in a state highway. Surely an open excavation at the location of a pipeline would be a defect in a state highway and probably telephone poles in the center of the highway might well be held to be a defect and although these defects might be put in the highway by other users of the same right of way the state is liable for such damages as any person who, without contributory negligence on his part, shall sustain. On the other hand, it could not be seriously argued that injuries received at grade crossings by collision between automobiles and trains could be said to be the result of any defect. This consider-

ation alone we feel would constitute a very real basis for a separate classification of railroads and pipelines.

Appellant asks on page 34 of its brief whether it is reasonable to provide for payment of a portion of the costs to the one class and not to the other. There is ample reason for the State Highway Commission upon some occasions to pay a portion of the cost of construction of a viaduct. The viaduct so constructed may be a quarter of a mile in length and will constitute just that much of improved highway. In that case it seems only reasonable that the State Highway Commission should pay part of the cost of such a structure. It will be observed that Section 15 provides that the railroad shall construct, improve, reconstruct, etc., and then provides that the State Highway Commission *may* (it is not mandatory) share in the expense thereof not to exceed 50%.

Appellee finds no fault with the cases of Connelly v. Union Sewer Pipe Co., 184 U. S. 540, Barbier v. Connly, 113 U. S. 27, or Quaker City Cab Co. v. Commonwealth of Pa., 277 U. S. 389, cited by appellant upon this proposition. These cases clearly substantiate the rule stated above that the classifications cannot be arbitrary but that they must be based upon substantial differences, and that no greater burden should be laid upon one than are laid upon others in the same calling and condition. A railroad grade crossing presents an entirely different problem for public regulation than does a pipeline buried beneath the highway. Such pipelines, as distinguished from railroad bridges or grade separations, form no part of the highway and add nothing to the state system of highways.

Appellant says on page 34 of its brief that railroads operating their fast moving trains across highways are inherently more dangerous than are transmission lines such as owned by it. Danger, of course, is a relative term. Oil, natural gas or electricity are sources of differing degrees of danger and hazard to life, limb and property depending entirely upon circumstances. The twenty-four inch high pressure natural gas transmission line of appellant when buried beneath the surface of such highways certainly is not a constant hazard to vehicular traffic. However, a leaky line of such magnitude at any such point could hardly be said to be an innocent instrumentality. If such a line were not encased in a large steel or clay pipe or tube where it crossed beneath state highways and it should become necessary to remove it and repair it, the resulting excavation across or along the public highway would not only seriously inconvenience the other users of the highways but would constitute an actual hazard and a condition inimical to the public safety.

Appellant asks whether in the final analysis railroads are so different from pipelines that separate classification is justified. Appellee submits that the classification is justified. In the case of Metropolitan Street Railway Company v. N. Y., 199 U. S. 1, this Court held that separate classification was permissible between surface railroads and sub-surface railroads so as to justify a diversity in the mode and extent of taxation.

In Savannah Thunderbolt, etc., Railway v. Savannah, 198 U. S. 392, a Street Railroad Company contended that it was subjected to a tax not assessed against a steam

railway, although the steam railway used the city streets and did business on the city streets by transporting freights from its regular station to various side tracks and that such a classification was contrary to the 14th Amendment. This Court held: "The difference between the two railroads is obvious, and warrants the diversity in the mode of taxation."

The case of Silver v. Silver, 280 U. S. 117, raises the constitutional question of whether or not a state statute providing that no person carried gratuitously as a passenger in an automobile may recover from the owner or operator for injuries caused by its negligent operation was in conflict with the equal protection clause in that it made an unreasonable classification. This Court in an opinion by Mr. Justice Stone held such a classification was reasonable and that a statutory classification may not be declared forbidden as arbitrary unless grounds for the distinction are plainly absent.

In the case of Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, a classification, based upon the number of employees, in a state statute abolishing the fellow servant and assumption of risk defenses under specified conditions was challenged. Mr. Justice Day says at page 576 of the opinion:

> "This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the States the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. Lindsley v. Natural Carbonis Gas Co., 220 U. S. 61, 76, and previous cases in this court cited

on page 79. That a law may work hardship and inequality is not enough. Many valid laws from the generality of their application necessarily do that, and the legislature must be allowed a wide field of choice in determining the subject matter of its laws, what shall come within them, and what shall be excluded."

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, (cited in the opinion of Jeffrey Mfg. Co. case above), is a leading case upon the question of legislative classification under the due process clause. Quoting from page 78 of the opinion by Justice Van DeVanter this Court said:

"Because the statute is directed against pumping from wells bored or drilled into the rock, but not against pumping from wells not penetrating the rock, and because it is directed against pumping for the purpose of collecting the gas and vending it apart from the waters, but not against pumping for other purposes, the contention is made that it is arbitrary in its classification, and consequently denies the equal protection of the laws to those whom it affects.

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably

can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Bachtel v. Wilson, 204 U. S. 36, 41; Louisville & Nashville R. R. Co. v. Melton, 218 U. S. 36; Ozan Lumber Co. v. Union County Bank, 207 U. S. 251, 256; Munn v. Illinois, 94 U. S. 113, 132; Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 615."

In Bachtel v. Wilson, 204 U. S. 36, headnote 3 states the rule as follows:

"While a state legislature may not arbitrarily select certain individuals for the operation of its statutes, the selection in order to be obnoxious to the equal protection clause of the Fourteenth Amendment must be clearly and actually arbitrary and unreasonable and not merely possibly so."

The Kansas legislature passed an act in 1885, the constitutionality of which was challenged in the case of A. T. & S. F. R. R. Co. v. Matthews, 174 U. S. 96, upon the ground that it violated the equal protection clause of the Federal Constitution. This statute made railroad companies liable for attorney fees for recovery of damages by fire. This Court upheld this statute and at page 106 of the opinion, said:

"It is the essence of a classification that upon the class are cast duties and burdens different from those resting up the general public. Thus, when the legislature imposes on railroad corporations a double liability for stock killed by passing trains it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains it must enter

into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay not only the damage which it has done, but twice that amount. If it succeeds, it recovers nothing. On the other hand, if it should sue an individual for destruction of its live stock it could under no circumstances recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations, and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

In the case of Fidelity Mutual Life Association v. Mettler, 185 U. S. 308, a Texas classification of life and health insurance companies separately from fire and marine insurance companies was held to be on a reasonable basis and not in violation of the due process clause.

See also:

Magown v. Illinois Trust & Saving Bank, 170 U. S. 283.
Finley v. California, 222 U. S. 28.
Mutual Loan Co. v. Martell, 222 U. S. 225.
Provident Savings v. Malone, 221 U. S. 660.
Field v. Barber Asphalt Co., 194 U. S. 618.

As may be noted from the many cases cited above, there is no set rule for determining what is or is not a proper legislative classification; it can only be determined by the examination of the facts in each case and by the court's action of inclusion and exclusion. In view of the

many different classifications cited above, and upheld by this Court, it seems that the separate classification of a railroad and a pipeline company is neither unreasonable, arbitrary or discriminatory. As heretofore stated, the regulation of the lines of each, where they cross the public highway, presents in each case a different problem to the State Highway Commsision, and a distinction between the two classifications has a reasonable relation to the object sought to be accomplished. The classification here made rests upon a natural and reasonable basis, and it has a substantial relation to the public welfare.

THE STATUTE IS A VALID DELEGATION OF THE POLICE POWER.

Appellant makes very little serious contention on this question except insofar as it is concerned with the alleged failure of the statute to provide notice. However, because this question in the sense of the taking without compensation was appellant's constitutional contention in the court below and because the opinion of that court deals principally with this question we submit the following in support of that opinion. The principal contention on this score below was that the Highway Commission should have proceeded to condemn under the right of eminent domain.

In the case of New Orleans Gas Light Company v. Drainage Commission, 197 U. S. 453, the facts were that the gas company had acquired a franchise to supply gas to the city through pipes and mains laid in the streets. The drainage commission proceeding under statutory au-

thority devised a drainage system and in the execution of its plans it became necessary to change the location of some of the pipes and mains of the gas company. The company maintained that because its pipes were located in the streets prior to the statutory enactment delegating police power to the drainage commission, that its rights were vested and it could not be required to change its pipes at its own cost and expense, and that such a requirement would amount to a taking of its property for public use without compensation. At page 461 of the opinion this Court makes the following statement:

> "We think whatever right the gas company acquired was subject, insofar as the location of its pipes were concerned, to such further regulations as might be required in the interest of the public health and welfare. These views are amply sustained by the authorities. (National Waterworks Company v. City of Kansas, 28 Fed. 921; Gas Light and Coke Co. v. Columbus, 50 Ohio State, 65.)"

The case of Erie Railroad Company v. Board of Utility Commissioners, 254 U. S. 394, is a number of consolidated cases all of which arose out of a grade crossing elimination and which involved the lines of the railroad, the street car company, the telegraph company, certain private spur tracks and the pipelines of a water company. This Court said, speaking through Justice Holmes, on page 410, 411:

> "Grade crossings call for a necessary adjustment of two conflicting interests, that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were

laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirements were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. (Denver & R. G. R. Co. v. Denver, 250 U. S. 241, 246, 63 L. ed. 958, 862, 39 Sup. Ct. Rep. 450."

The rule is stated in M. K. & T. v. Oklahoma, 271 U. S. 303, 307, as follows:

"It is elementary that for the safety and convenience of the public, the state, either directly or through its municipalities may reasonably regulate the construction and use of highways where they cross railroads. The legitimate exertion of police power to

that end does not violate the constitutional rights of railroad companies. They may be required at their own expense to construct bridges or viaducts whenever the elimination of grade crossings reasonably may be required, whether constructed before or after the building of the railroads. (Northern P. R. Co. v. Duluth, 208 U. S. 583, 597; 52 L. ed. 630, 636, 28 Sup. Ct. Rep. 341; Chi. M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 438, 58 L. ed. 671, 674, 34 Sup. Ct. Rep. 400; Mo. P. R. Co. v. Omaha, 235 U. S. 121, 127, 59 L. ed. 157, 160, 35 Sup. Ct. Rep. 82; Erie R. Co. v. Public Utilities Comm'rs., 254 U. S. 394, 409, 412, 65 L. ed. 322, 333, 334, P. U. R. 1921 C, 143, 41, Sup. Ct. Cot 169.) And such costs are not included in the just compensation which the railroad companies are entitled to receive. Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 343, 54 L. Ed. 1060, 1064, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206; Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 440, 58 L. ed. 675, 34 Sup. Ct. Rep. 40)"

It is true that very few cases involving pipelines have reached this court although the question here presented as applying to railroads has often been adjudicated. In Lake Shore Ry. v. Clough, 242 U. S. 375, this court held that the expense of taking out existing piers and abutments of a railway bridge and erecting new ones, made necessary by the deepening of a channel in the carrying out of a proposed drainage system to be constructed in the public interest under the sanction of the Indiana Drainage Act of March 11, 1907, may be cast upon the railway company without denying the due process of law guaranteed by U. S. Const., 14th Amend., although the present bridge and abutments form no obstruction to the natural flow of the stream, where the company's

charter obligates it not to interfere with the free use, or unnecessarily impair the usefulness of any stream or water-course which its road may cross—a duty which the highest state court interprets as a continuing one, and as applicable to artificial as well as natural water-courses.

Where the pipeline company the owner of the fee of the land which it occupies, it might occupy a different position. As it is, it does not assume the burdens of a landowner but occupies easements for its own purposes only. This being so and because the simultaneous occupation of the same land is not inconsistent the private rights of the pipeline company are not dispossessed, they are being merely regulated in order that the traveling public be not endangered.

We consider further argument in this regard unnecessary although we respectfully invite the attention of the court to the following cases, thought to be particularly applicable: Minneapolis v. Railway Company, 98 Minn. 380; 108 N. W. 261, affirmed 214 U. S. 497; Chi. Milwaukee & St. Paul v. Minneapolis, 232 U. S. 430; Chi. etc. R. Co. v. Trambarger, 238 U. S. 78; Mo. Pac. Railway Co. v. Omaha, 235 U. S. 127; West Chicago R. Co. v. Illinois, 201 U. S. 526; New York & N. E. R. R. Co. v. Bristol, 151 U. S. 556; C. B. & Q. R. Co. v. Chicago, 166 U. S. 226.

CONCLUSION.

Appellee concludes that the provisions of Section 16, Chapter 225, Laws of Kansas, 1929, are not violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States by reason of the rules of statutory construction established by the Supreme Court of the State of Kansas and approved in similar cases by this court and approved in other jurisdictions by this court; that the statute implies that a notice shall be given to the persons affected by the orders of the commission made under said section, and that an opportunity to be heard is to be granted. However, section 3 of the act in effect authorizes a judicial review of the action of the commission, and appellee submits that the pipe line company in this case has been afforded a hearing in the Supreme Court of the State of Kansas, and although the record in this case is silent as to what proceedings were had by the Highway Commission, that such a hearing by the Supreme Court constitutes due process.

Because the only similarities between railroads, pipe lines and telephone lines is the fact that they are all engaged in transportation, we believe that separate legislative classification is justified and that the separate classification of railroads in section 15 of the act is both reasonable and proper, and that the same does not deny to the appellant the equal protection of the laws. We further conclude that the statute is a valid delegation of the state's police power and that the order of the commission issued thereunder is a valid exercise of police

power. We therefore respectfully pray that the judgment of the Supreme Court of the State of Kansas be affirmed.

Respectfully submitted,

WINT SMITH, Asst. Atty. Gen.,
Topeka, Kansas,
KIRKE W. DALE,
Arkansas City, Kansas,
OTHO W. LOMAX,
Cherryvale, Kansas,
Attorneys for Appellee.

APPENDIX.

CHAPTER 225, SESSION LAWS OF KANSAS, 1929.

RELATING TO ROADS AND HIGHWAYS, THE STATE HIGHWAY COMMISSION AND ITS POWERS AND DUTIES, PROVIDING FOR THE CONSTRUCTION, IMPROVEMENT, RECONSTRUCTION AND MAINTENANCE OF THE STATE HIGHWAY SYSTEM AND FOR THE REIMBURSEMENT OF BENEFIT DISTRICTS.

Be it enacted by the Legislature of the State of Kansas:

Section 1. That section 1, chapter 255, Laws of 1927, be amended to read as follows: That there is hereby created a state highway commission which shall be a body corporate with powers to sue and be sued. Such highway commission shall consist of six members to be appointed by the governor, one from each of the following districts: First district shall comprise the counties of Doniphan, Atchison, Leavenworth, Wyandotte, Johnson, Douglas, Jefferson, Brown, Jackson, Shawnee, Osage, Nemaha, Lyon, Wabaunsee, Pottawatomie, Marshall and Riley. Second district shall comprise the counties of Washington, Clay, Geary, Morris, Chase, Dickinson, Marion, McPherson, Saline, Ottawa, Cloud, Republic, Jewell, Mitchell, Lincoln and Ellsworth. Third district shall comprise the counties of Smith, Osborne, Russell, Phillips, Rooks, Ellis, Norton, Graham, Trego, Decatur, Sheridan, Gove, Rawlins, Thomas, Logan, Cheyenne, Sherman and Wallace. Fourth district shall comprise the counties of Miami, Linn, Bourbon, Crawford, Cherokee, Franklin, Anderson, Allen, Neosho, Labette, Coffey, Woodson, Wilson, Montgomery,

Greenwood, Elk and Chautauqua. Fifth district shall comprise the counties of Butler, Cowley, Harvey, Sedgwick, Sumner, Rice, Reno, Kingman, Harper, Barton, Stafford, Pratt, Barber, Rush, Pawnee, Edwards, Kiowa, and Comanche. Sixth district shall comprise the counties of Ness, Hodgeman, Ford, Clark, Lane, Finney, Gray, Meade, Scott, Haskell, Seward, Wichita, Kearney, Grant, Stevens, Greeley, Hamilton, Stanton, and Morton. The members forming the first commission hereunder shall be appointed within thirty days after the passage of this act, and shall serve as follows: The commissioners from the odd-numbered districts shall serve until March 31, 1928. The commissioners from the even-numbered districts shall serve up to and including March 31, 1929. Before the expiration of the term of a commissioner the governor shall appoint his successor for a term of two years, to assume his duties on April 1st next following: Provided, however, in case of a vacancy for any cause, the governor shall make an appointment to become immediately effective for the unexpired term. Each member shall receive as compensation for his services, ten dollars ($10) per day for each day actually spent in performance of his duties, not to exceed one thousand five hundred dollars ($1,500) per year, and his actual and necessary traveling expenses. Each member shall give bond to the state in the sum of five thousand dollars ($5,000) conditioned upon the faithful discharge of the duties required by law.

Sec. 2. That section 74-2002, Revised Statutes 1923, be amended to read as follows: That the executive

council shall provide suitable offices at Topeka for the commission, where it will hold regular meetings at such times as the commission may decide; it shall keep a common seal of such design as the commission shall determine; it shall keep a record of all proceedings and all of the files and records, under reasonable regulations, shall be kept open for public inspection and certified copies thereof, signed by the secretary and attested with the seal, shall be received in evidence in any court in the state. The state highway engineer and his assistats shall be provided with offices ad drafting rooms at Topeka, and such other points throughout the state as are necessary, and the engineering testing laboratories at the Kansas state agricultural college at Manhattan shall be available for the use of the commission and the state highway engineer at all times.

Sec. 3. That section 6, chapter 255, Laws of 1927, be amended to read as follows: That the state highway commission shall designate, adopt and establish and may let out, open, relocate, alter, vacate, redesignate and reestablish highways in every county in the state, the total mileage of which shall not exceed 8,690 miles, and the total mileage of which in each county shall not be less than the sum of the north to south and east to west diameters of the county, and which shall connect the county seats and principal cities and market centers which highways and all bridges and culverts thereon shall comprise the state highway system: Provided, That the highways heretofore designated as state highways shall be a part of the state highway system and no substantial change therein

shall be made except when the public safety shall require such substantial change. Highways designated under this act shall be state highways, and all other highways shall be either county roads or township roads as provided for elsewhere in the Kansas statutes. The state highway system thus designated shall be constructed, improved, reconstructed and maintained by the state highway commission from funds hereinafter and otherwise by law provided. In addition to the designation of highways as herein provided, the state highway commission shall designate in those cities on the state highway system certain streets as connecting links in such system.

Sec. 4. That section 2, chapter 255, Laws of 1927, be amended to read as follows: All members of the state highway commission, the director of highways and all engineers and all other employees designated by the commission, shall take the oath provided in the constitution for state officers, and in addition thereto shall take and subscribe to the following oath before entering on the discharge of their duties: "I do solemnly swear (or affirm) that I am not now nor will I be interested either directly or indirectly, during my connection with the state highway commission, otherwise than as an official of the state, in any contract or arrangement for the construction or maintenance of any public road or highway, nor in the provision of supplies or materials therefor, nor in the appointment of any person to any position in connection therewith; nor will I ever use any information or influence I may have by reason of my official position to gain any pecuniary reward or material advantage to

myself, nor disclose such information that it may be used by others. So help me God."

Sec. 5. That section 3, chapter 255, Laws of 1927, be amended to read as follows: The commission may establish rules and regulations to govern the transaction of all business and shall appoint a director of highways who shall be a practical business man, shall receive an annual salary of not to exceed five thousand dollars ($5,000) shall be chosen solely for fitness, irrespective of political beliefs or affiliations, and may be removed by a majority vote of the commission at any time. The director of highways shall be the executive officer of the commission, and shall be subject to the orders and direction of the commission. The director of highways shall give his whole time to the duties of his office. Before entering upon the duties of his office, the director of highways shall give bond to the State of Kansas in the sum of twenty-five thousand dollars ($25,000) subject to the approval of the state highway commission, conditioned upon the faithful performance of his duties. Said bond, when approved by the commission, shall be filed with the secretary of state.

Sec. 6. That section 4, chapter 255, Laws of 1927, be amended to read as follows: The members of the state highway commission, and all employees of the state highway commission who are required by law or by the order of such commission to furnish bond, shall furnish such bond conditioned upon the faithful performance of all duties imposed by law, or by the rules and regulations of said state highway commission, and for the proper ac-

counting of all property, moneys, and records coming into the possession of such officials or employees by virtue of their official positions. Said bonds shall be in each case signed by a surety company duly authorized to transact business in the State of Kansas, and the cost thereof shall be paid from the funds provided for the support and maintenance of the state highway commission and the state highway department.

Sec. 7. That section 5, chapter 255, Laws of 1927, be amended to read as follows: The director of highways, subject to the approval of the state highway commission, shall have full authority to appoint a state highway engineer and such other employees as shall be necessary to carry on the work of the commission, and shall have full authority to employ, remove, define the duties, and fix the salaries of engineers, clerks, stenographers, and such other employees as may be necessary to carry on the work of the commission. The attorney-general shall appoint an assistant attorney-general, who shall be the attorney for the state highway commission, and whose salary shall be fixed and paid as provided for employees of said state highway commission. The director of highways shall have the supervision of the work of the state highway commission and of each of its divisions under the direction of the state highway commission charged with carrying out the provisions of this act or the rules and regulations which may be enacted by the commission, and may assign such employees and reassign them at his discretion.

Sec. 8. That section 11, chapter 255, Laws of 1927, be amended to read as follows: The state highway commission is authorized to perform all work, or to enter into, perform and require the performance of all contracts incident to the construction, improvement, reconstruction and maintenance of the state highway system and operation of the state highway department and shall take such steps as will give the provisions of this act full force and effect and do and perform all other duties required by law: Provided, That all bids shall be received by the state highway commission in the state highway commissioner's district in which the work is to be done and in the county where the major portion of the work to be contracted for on the same date is located: Provided further, That the state highway commission may enter into contracts with any of the counties of the state to do any work in the repair, construction or maintenance of the state highway system.

Sec. 9. The state highway commission shall, before awarding any contract for the construction, improvement, reconstruction or maintenance of the state highway system, publish notice of the letting at least once in each week for two consecutive weeks in the official newspaper published in each county in which such highways or a section thereof is to be constructed or work to be done, and in such other newspaper as the state highway commission may designate, which notice shall specify with reasonably minuteness the character of the improvement contemplated, the time and place at which the bids will be received, and invite sealed proposals for the same. Such

other notice may also be given as the state highway commission may deem necessary and proper.

Sec. 10. Before advertising for bids for any contract as provided in the preceding section said state highway commission shall provide plans and specifications of the proposed work or improvement, which plans and specifications shall be displayed for the inspection of bidders at the office of the state highway commission and in the office of the county clerk in the county or counties where work is to be done at least fifteen days before the time for receiving bids.

Sec. 11. All contracts for the construction, improvement, reconstruction and maintenance of the state highway system, the cost of which exceeds one thousand dollars ($1,000) except contracts between the state highway commission and the various counties, shall be awarded at a public letting to the lowest responsible bidder. The state highway commission shall make necessary rules and regulations covering the making and receiving of bids and letting of contracts: Provided, That in case of an emergency, the nature of which shall be stated in the minutes of the state highway commission, contracts for repairs and reconstruction may be let without public letting and notice, as provided in this act. The person or persons to whom a contract may be awarded shall give good and sufficient surety bond by a company authorized to do business in this state, to be approved by the state highway commission in such sum as the state highway commission shall fix, not less than such contract price, conditioned that such contractor will faithfully perform

such contract in every respect: Provided, That the state highway commission shall have the right to reject any and all bids.

Sec. 12. The state highway commission shall make partial payment to a contractor performing any road or bridge work under contract with it, as the work may progress, said partial payment not to exceed eighty-five per cent (85%) of the contract price of the material delivered and work done and accepted. At least fifteen per cent (15%) of the full contract price of any such work shall be withheld until the work is satisfactorily completed and approved by the state highway commission and the provisions of the contract and bond therefor have been fully satisfied.

Sec. 13. After the state highway commission shall deem it advisable for the proper completion of the state highway system to designate any city street as a connecting link in the state highway system, it may assist said city on the state highway system in the construction, improvement and reconstruction of said streets as herein afterward set out. The type of such construction, improvement and reconstruction shall be determined by agreement between the city and the state highway commission, and the construction shall be under the supervision of the state highway commission. The cost of construction, improvement and the reconstruction of such street highways on the basis of a street highway eighteen feet wide shall be paid from the state highway fund provided for construction of state highways, and the cost of the remainder of such street highways shall be paid by the city

from a fund raised in the manner provided by law for the payment for grading, curbing, guttering and paving streets in such city: And provided, That in no event shall the state highway commission be liable for construction, improvement or reconstruction as herein set out unless the state highway commission shall have designated such streets as connecting links in the state highway system: And provided further, That the state highway commission shall decide the time when such construction, improvement or reconstruction shall be commenced.

Sec. 14. That the state highway commission, in the name of the state, may acquire title by purchase, donation or dedication or by the exercise of the right of eminent domain, to any lands or interest or rights therein, to water, gravel, stone, sand or other material, or to spoil banks or to borrow pits necessary for the construction, improvement, reconstruction, maintenance or drainage of the state highway system, or to rights of way giving access to spoil banks or borrow pits or any bed, pit, quarry or other place where gravel, stone, water or other material required in the construction, improvement, reconstruction, maintenance or draiage of state highways may be located. The right of eminent domain when exercised as herein provided shall be in accordance with the provisions of article 1, chapter 26 of the Revised Statutes of 1923. The state highway commission may dispose of any real estate, or any right, title, or degree or variety of interest therein, as it may deem expedient or necessary whenever the commission determines that such real estate, or interest therein, is no longer needed

or used for highway purposes, and may exchange the right of way to be abandoned for new and other right of way: Provided, That when any road on the state highway system is vacated, the lands or interest or rights therein acquired by the state highway commission for right of way under the provisions of this section, unless disposed of as above provided, shall revert to the present owners of the land of which it was originally a part.

Sec. 15. That the state highway commission, in the construction, improvement, reconstruction or maintenance of the state highway system, shall have the power and authority to compel all railroad companies operating steam or electric railroads in this state to construct, improve, reconstruct or maintain in a manner to be approved by the state highway commission, viaducts, tunnels, underpasses, bridges or grade crossings where the lines of said railroad companies intersect state highways, when in the judgment of the state highway commission such viaducts, tunnels, underpasses, bridges or grade crossings are necessary for the proper construction of the state highway system, for the safety of the general public, or for the elimination of a dangerous grade crossing: Provided, That the expense of such construction, improvement, reconstruction or maintenance may be divided between the railroad company and the state highway commission in a fair and equitable proportion to be determined by the state highway commission, the state highway commission, however, to pay not to exceed fifty per cent (50%) of the cost of such construction, improvement, reconstruction or maintenance of viaducts, tunnels, underpasses or

bridges: Provided further, That grade crossings shall be constructed and maintained at the expense of the railroad company. If after due notice to said railroad company that in the judgment of the state highway commission the construction, improvement, reconstruction or maintenance of such viaduct, tunnel, underpass, bridge or grade crossing is necessary, said railroad company fails to comply with the order of the state highway commission as provided by this section, the state highway commission is empowered and authorized to forthwith construct, improve, reconstruct or maintain such viaduct, tunnel, underpass, bridge or grade crossing and the amount so expended for such construction, improvement, reconstruction or maintenance shall comprise a charge against such railroad company and that state highway commission shall render a bill to such railroad company stating the amount expended and for what purpose, and upon the failure or refusal of such railroad company to make payment of the amount due the state the state highway commission shall forward all data and information to the attorney-general of this state, who shall immediately institute a suit in the name of the state highway commission for the recovery of the amount reported by the state highway commission as due from the railroad company for its proportion of the cost of the construction, improvement, reconstruction or maintenance of such viaduct, tunnel, underpass, bridge or grade crossing. Upon the recovery of such fund the state highway commission shall deposit same with the state treasurer and said sum shall be apportioned to the different funds in the amounts expendi-

tures from such funds were made. When the state highway commission deems it advisable, said railroad company may be required by order of the state highway commission, to install and maintain suitable safety devices or warning signals at dangerous or obscure crossings to indicate the approach of trains.

Sec. 16. Whenever any person, firm or any corporation created for the purpose of constructing and maintaining magnetic telegraph or telephone lines or for the purpose of constructing and maintaining lines for the transmission of electric current or for the purpose of transporting oil or gas or water by pipe lines, or municipal corporations, shall construct or maintain poles, piers, abutments, pipe lines or other fixtures along, upon or across any state highways, such poles, wires, piers, abutments, pipe lines and other fixtures shall be located upon that part of the right of way of said state highway designated by the state highway commission and the state highway commission is authorized and empowered to require the removal of such poles, piers, abutments, wires and pipe lines and other fixtures now upon state highways from the present location on said state highways to such part of the right of way of said state highways as the state highway commission shall designate, and if said person, firm or corporation, upon receiving notice of the requirement of the state highway commission that said poles, piers, abutments, wires, pipe lines or other fixtures be moved as herein provided, fails to comply with such requirement of the state highway commission, the state highway commission may remove such poles, piers, abut-

ments, wires, pipe lines and other fixtures to such place on the right of way of said state highways as may be designated by said state highway commission and the cost of such removal shall be paid to said state highway commission by said person, firm or corporation upon a statement of cost being furnished to said person, firm or corporation. If said person, firm or corporation refuses to pay said charges, the state highway commission shall notify the attorney-general, who shall bring suit against said person, firm or corporation in the name of the state highway commission to recover said amount, such amounts received from such persons, firms or corporations shall be placed in the fund from which the cost of such removal was paid.

Sec. 17. That section 7, chapter 255, Laws of 1927, be amended to read as follows: That the remainder of the special motor vehicle tax now provided by law or which may be hereafter provided by law after the fee for registration has been sent to the secretary of state or other official designated by law to receive the same, shall be applied to the construction, improvement, reconstruction and maintenace of highways in the state and shall be transmitted monthly by the county treasurers of the various counties to the state treasurer, and together with the motor vehicle fuel tax provided by law for the construction, improvement, reconstruction and maintenance of highways in the state, shall be by the state treasurer placed in the highway fund. On the first day of April, 1929, the unexpended balances remaining in the various funds provided by section 7, chapter 255, Laws of Kan-

sas, 1927, except the funds applied to county and township roads, shall be transferred and paid to the state treasurer and by him credited to the highway fund: Provided, Such sums, transferred from the county and township road funds or from the funds allotted to the counties from the county free fund, shall be expended by the state highway commission within the respective counties from whence same are paid. All funds received by the various counties from the sale of benefit district bonds heretofore or hereafter issued, under the provisions of Revised Statutes 68-701 to 68-709 and amendments thereto, shall be transferred by the county treasurers to the state treasurer and by him placed in the highway fund; and such amounts shall be expended in the counties from which they are received and for the purposes for which said bonds were issued: Provided, That nothing in this act shall be construed to relieve any county in which a benefit district has been organized under the provisions of sections 68-701 to 68-709 inclusive Revised Statutes 1923 and amendments thereto from the duty and liability to issue and sell bonds under the provisions of said act in the amount necessary to pay such part of the cost of the construction of such benefit district roads in said benefit district required by said act to be paid by the county, township and benefit district. Any unexpended balance remaining in the fund in which is placed that part of the fees for registration sent to the secretary of state or other official designated by law to receive the same, and appropriated for use in the administration of the motor-vehicle registration act, unexpended at the time

this act takes effect or at the end of any calendar year, shall be placed in the highway fund. The highway fund shall be apportioned as follows:

(1) There shall be paid from the highway fund the sum or sums appropriated by the legislature not exceeding for any one year $500,000 for the support and maintenance of the state highway commission and the state highway department, including salaries, traveling expenses and all other expenses connected with or incident to the work of the state highway commission and the state highway department.

(2) The sum of $800,00 quarterly up to April 1, 1930, and the sum of $900,000 quarterly on and after April 1, 1930, shall be transferred by the state treasurer from the highway fund into a fund known as the county and township road fund which shall be distributed to the 105 counties as follows: 40 per cent shall be distributed equally to the 105 counties of the state and 60 per cent shall be apportioned and distributed to the 105 counties of the state in proportion to the assessed valuation based upon the preceding year's assessment. The fund thus distributed to the various counties shall be used for the construction, improvement, reconstruction and maintenance of county and township roads and bridges at the option of the county commissioners: Provided, That not less than 50 per cent of said fund shall be used on township roads and bridges and shall be divided among the various townships in each county in the proportion that the mileage of township roads in the various townships bears to the total mileage of township roads in the county:

Provided, That in counties which have adopted the county unit system said fund shall be divided between the county road fund and the county bridge fund in such proportion as the board of county commissioners shall determine. From and after April 1, 1929, the state highway commission shall not have any jurisdiction or control over any roads or bridges except on the state highway system, or the funds hereunder distributed to counties for county and township roads, or other road funds available to the counties and townships.

(3) There shall be apportioned the sum of $700,000 quarterly to the 105 counties as follows: 40 per cent shall be apportioned equally to the 105 counties of the state and 60 per cent shall be apportioned among the 105 counties of the state in proportion to the assessed valuation based on the preceding year's assessment, this fund to be used by the state highway commission in the county to which it is apportioned as follows: First, where roads on the state highway system have been built under the benefit district plan to payment and reimbursement of benefit district assessments as provided in section 18 of this act; and for the payment of the principal sum of outstanding warrants issued by any county for the construction, improvement or reconstruction of the state highway system; second, for maintenance of that portion of the state highway system within the respective counties; third, for construction of state highways: Provided, That not more than 50 per cent of the remainder of the fund allocated to such county under the provisions of this paragraph shall be used in any one year for con-

struction of state highways in such counties until reimbursement has been made to the townships, and to the counties as hereinafter set out; fourth, for reimbursement (a) to townships, and (b) to counties, as provided in section 18 of this act.

(4) The state highway commission shall annually apportion and distribute quarterly to cities on the state highway system from the highway fund at the rate of two hundred and fifty dollars per mile for the maintenance of streets in said cities designated by the state highway commission as connecting links in the state highway system, said moneys to be credited to the street and alley funds of such cities. In lieu of said apportionment the state highway commission may maintain such streets in cities of the third class and pay for such maintenance from the highway fund.

(5) All of the remainder of such highway fund shall be used by the state highway commission in the construction, improvement, reconstruction, and maintenance of the state highway system: Provided, That the state highway commission shall not construct more than one hundred miles of high type pavement in any one year until all the roads of the state highway system have been improved with an all weather surface such as sand, gravel or chat.

All apportionments and distributions provided for by this section shall be made quarterly on the first days of January, April, July and October of each year.

Sec. 18. That section 9, chapter 255, Laws of 1927, be amended to read as follows: The state highway com-

mission shall apply that portion of funds provided for reimbursement by number 3 of section 17 of this act first to the payment of the installments of the benefit district tax assessed on the property in such benefit districts as the same become due and to the reimbursement to the taxpayers of all assessments made and collected on such lands and improvements but not more than one of the assessments made and collected or payments as they become due shall be reimbursed to the taxpayers in the district in any one year. Such payments and reimbursements to be made in full upon the land and improvements which lies one (1) mile or more from the road for which the benefit district tax was assessed, and upon the lands and improvements which lie within one (1) mile of such road in the amount equal to 80 per cent of said assessment, except however, that when the road for which the benefit district tax was assessed is a gravel, sand, sand clay or road of like class, then the reimbursement upon the land and improvements which lie within one mile of such road shall be in an amount equal to 50 per cent of such assessments: Provided, That if, in any year, the funds from which such payments and reimbursements are to be made shall be insufficient to make such payments and reimbursements in full, the state highway commission shall prorate said fund among the several benefit district taxpayers, and the balance of said payments and assessments shall thereafter be reimbursed: Provided further, That when no tax or assessment has been levied against the lands and improvements in said benefit districts, the state highway commission shall pay the portion of the

cost chargeable to the lands and improvements in such benefit districts, in which event no special assessments shall be levied against the lands in said benefit district or districts: Provided further, No interest shall be paid under this section to any person, to any township or to any county: And provided further, The state highway commission shall not be bound to reimburse to any township or to any county (under the benefit district plan) more than 5 percent of the amount found to be due such township or county under this act, in any one year, but the state highway commission may in its discretion reimburse any such township or county the whole or any larger part found due such township or county, however, the state highway commission shall not make any reimbursement to any township or to any county unless such reimbursement can be made under the order of apportionment and out of the fund as provided in number (3) of section 17 of this act: Provided further, The right to reimbursement under this act shall not be assignable separate from the sale of the land and no reimbursement in any amount shall be made or paid to any person who has acquired the claim for reimbursement separate and apart from the real property.

Sec. 19. That on April 1, 1929, the boards of county commissioners of the various counties shall transfer to the state highway commission and deliver to its authorized representatives all machinery, equipment and road materials which said counties have heretofore purchased from the county and state road fund of such counties for use on state highways. That on April 1, 1929, the state

highway commission shall assume the rights and liabilities of the various counties on all existing contracts for the construction, improvement, reconstruction or maintenance of state highways and bridges and for the purchase of machinery, equipment or material for use on state highways.

Sec. 20. That section 13, chapter 255, Laws of 1927, be amended to read as follows: That if any section, clause, sentence, paragraph, part or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section, clause, sentence, paragraph, part or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections, clauses, sentences, paragraph, parts or provisions may be found invalid by any court.

Sec. 21. That section 12, chapter 255, Laws of 1927, be amended to read as follows: In administering and carrying out the provisions of this act, the state highway commission shall be governed by the highway laws of the state so far as possible, and for the purpose of administration of this act all Kansas statutes referring to roads not in conflict with the act shall also apply to state highways.

Sec. 22. Original section 74-2002 and 68-150, Revised Statutes of Kansas for 1923, and original sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, chapter 255, Laws of Kansas, 1927 are hereby repealed.

Sec. 23. Any person who shall without contributing negligence on his part sustain damage by reason of any defective bridge or culvert on, or defect in a state high-

way, not within an incorporated city, may recover such damages from the state of Kansas; that is to say, such recovery may be from the state when the director of highways, or state highway engineer, or any member of such state highway commission, or any foreman, patrolman, or other employee in charge of the construction, maintenance or upkeep of such highway, shall have had notice of such defects five days prior to the time when such damage was sustained, and for any damage so sustained the injured party may sue the state highway commission, and any judgment rendered in such case shall be paid from any funds in the state highway fund on the order of the state highway commission. For any damage so sustained action may be brought in the District Court of the county in which such damage was sustained, or in the District Court of the county of which the plaintiff is an actual resident at the time of the sustaining of such damage; and upon the filing of such action in such court a summons shall issue out of such court directed to the sheriff of Shawnee County, Kansas, for service, and service thereof shall be made by delivering to the director of highways personally a copy of such summons, or by leaving a copy of such summons at the office of such director of highways, in Shawnee County, Kansas; Provided, That no such action shall be maintained unless within ninety days after the sustaining of such damage, written notice, stating the date, when, and place where such damage was sustained, the name and correct post-office address of the person sustaining such damage, and the character of the damage sustained, shall be served

upon the director of highways, either in person or by registered mail at his office in Topeka, Shawnee County, Kansas: Provided further, That the action must be commenced within two years.

Sec. 24. That this act shall take effect and be in force from and after April first, 1929, and on its publication in the official state paper.